No. 12398

United States Court of Appeals

FOR THE NINTH CIRCUIT

COVEY GAS AND OIL COMPANY,
a corporation,

Appellant,

vs.

NORELL T. CHECKETTS and TWILA CHECKETTS, husband and wife,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

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CASES AND AUTHORITIES CITED

STATUTES AND RULES

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COMPLAINT
(R. pp. 2, 3, 4, 5)

The complaint alleges that the amount in controversy exceeds the sum of $3,000.00.

That Norell T. Checketts and Twila Checketts are the mother and father, respectively, of Gary Checketts, now deceased.

That the defendant, Covey Gas & Oil Company, is a corporation organized and existing by virtue of the laws of the State of Idaho.

That the defendant is the owner of an oil tanker used in the operation of its business, bearing Idaho license number 1B-806.

That Ralph L. Bowman was an employee of the defendant corporation, and that on the 24th day of February, 1947, was acting as an agent of the defendant corporation, and did carelessly operate the oil tanker of the defendant upon U. S. Highway 30-91 in Bannock County, Idaho.

That said oil tanker operated by the defendant corporation's agent was operated negligently and carelessly.

That as a result of the negligent operation of the oil tanker, Gary Checketts, son of the plaintiffs, was killed.

That Gary Checketts was a bright and intelligent boy and would have contributed large sums of money to his parents and would have performed services and earnings of great value to his parents prior to his majority.

That his parents would have had great comfort and companionship in the society of their son.

That the plaintiffs have incurred in medical and hospital expense the sum of $407.50.

That they have suffered $75,000.00 general damages and have suffered punitive damages in the amount of $25,000.00.

ANSWER

(R. pp. 5, 6, 7, 8 & 9)

The answer of the defendant admits the residence of the plaintiffs, admits the marital status of the plaintiffs, and ad-

mits that the Covey Gas & Oil Company is an Idaho corporation.

Further, the defendant admits that it is the owner of the truck referred to in the complaint.

And admits that Ralph L. Bowman, the operator of the truck, was an employee of the defendant upon the 24th day of February, 1947, but denies the other allegations in that paragraph of the complaint.

The defendant further pleaded affirmative defenses:

I

That the said Gary Checketts did not exercise care and caution in the premises to avoid the accident.

II

That the operator of the school bus in which the said Gary Checketts had been riding did not exercise ordinary care, caution and prudence in the premises to avoid the accident and that the accident was a result of the negligence of the operator of the school bus, Robert R. Smith.

III.

The defendant further alleges that the defendant's operator of the tanker, Ralph L. Bowman, exercised reasonable care at the time and place of the accident.

IV.

Further the defendant alleges in his answer that an action had been previously instituted in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, wherein Ralph L. Bowman was defendant and likewise the Covey Gas & Oil Company, appellant herein, was defendant, and that an order of dismissal was entered by appellee in that case as against Covey Gas & Oil Company, and that said cause as to it was dismissed but is still pending against Ralph L. Bowman, growing out of the same accident.

JURISDICTION

This is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds $3,000.00, exclusive of interest and costs, and the United States District Court has jurisdiction under Title 28, Section 41 U.S.C.A. (Judicial Code Section 24 Amended).

This appeal is from a final judgment of the United States District Court for the Eastern District of Idaho. The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction under Title 28 U.S.C.A. (Judicial Code Section 128, Amended).

STATEMENT OF THE CASE

This is an action for damages brought by the plaintiffs, Norell T. Checketts and Twila Checketts, for the alleged wrongful death of their son, Gary Checketts.

The defendant corporation, by and through its agents, servants and employees, operates a retail oil distributing service for Pocatello and region. Upon the 24th day of February, 1947, at approximately 4:00 P. M. of said day, the defendant's truck was being operated in a northerly direction along and upon U. S. Highway 30-91 in Bannock County, Idaho. The truck then and there, the property of the defendant corporation, was being operated at the time by Ralph L. Bowman, an agent of the defendant corporation. (R. pp. 27, 28).

The deceased, namely, Gary Checketts, was a student in the Pocatello Idaho, school system, and at the hour and upon the day hereinbefore set forth, the said Gary Checketts, a minor boy of approximately eight years, was riding in and being conveyed to his home from school by a school bus owned and operated by Independent School District No. 1, Class A. The school bus in which Gary Checketts, deceased, was riding was being at that time driven by an agent of the school district, Robert R. Smith. The operator of the school bus, driving in a southerly direction, stopped his said school bus upon the oiled portion of said highway above described and stopped said bus with all of the four wheels thereof upon the oiled portion of said roadway, which is at said place a two-lane highway. (R. p. 106). Gary Checketts, the deceased son of the plaintiffs herein, lived across said highway and to the east thereof, and the place where said school bus was stopped was directly opposite the home of Gary Checketts, deceased, which fact the school bus driver knew. Gary Checketts alighted from the school bus and ran around to the back of the school bus and started

across the highway to his home and was struck by the defendant's truck shortly after he had entered the east lane of the highway. The evidence further shows that the operator of the defendant's truck did not stop before passing said school bus. Gary Checketts was struck by the truck then being operated by the defendant's agent and was killed as a result thereof. The operator of the truck stopped his truck (R. p. 125) and with the assistance of a highway patrolman conveyed the little boy to the St. Anthony Hospital, Pocatello, Idaho, where shortly thereafter he died. Gary Checketts, at the time of the accident, was eight years of age and residing at the time with his mother and father approximately four miles south of Pocatello, Bannock County, State of Idaho, and at the time of the accident was attending the public schools in the city of Pocatello, and was at the time of the accident being conveyed back and forth from school to home by school buses owned by Independent School District No. 1, Class A. (R. p. 105).

The case was tried before a jury and before the Hon. Chase A. Clark, District Judge of the District Court of the United States in and for the State of Idaho, in and for the Eastern Division.

JUDGMENT

A verdict was returned by the jury in the amount of $35,407.50. Such judgment was entered thereon in such amount June 3, 1949, filed June 3, 1949.

The defendant corporation filed its motion for a new trial (pp 19, 20 and 21 of Transcript), which motion for

new trial was denied by the Hon. Chase A. Clark, United States District Judge, upon August 18, 1949, (pp 22, 23 and 24 of Transcript). Appeal was thence taken to this court (pp 25 and 26 of Transcript).

QUESTIONS PRESENTED

1. Whether or not a verdict of $35,407.50 is excessive for the death of a minor child, approximately eight years of age?

2. Should the Trial Court have reduced the amount of the verdict, such verdict being in the amount of $35,407.50?

3. Should this Court grant a new trial because of the excessiveness of the verdict?

4. Should this Court reduce the verdict in this case because of its excessiveness?

5. Should the Trial Court have instructed the jury that in arriving at their verdict, they did not have a right to take into consideration anguish and grief of the parents?

6. Should the Trial Court have, upon motion of the defendant, made Ralph L. Bowman, the operator of the defendant's truck, a party to the action?

The above and foregoing questions were raised by Defendant's Motion for New Trial (R. p. 19, 20 & 21); Defendant's Requested Instruction (R. p. 150 & 151); Defendant's Motion to bring in Ralph L. Bowman as party (R. p. 12 & 13) and Motion for New Trial (R. p. 19, 20 & 21); Notice of Appeal (R. p. 25); Designation of Record (R. p. 156 & 157); and this Brief.

SPECIFICATIONS OF ERRORS

I.

The Court erred in refusing to grant defendant's requested instruction pertaining to the matters and things that the jury did not have right to take into consideration in arriving at its verdict. The defendant requested that the Court instruct the jury that in arriving at the damages in this case, they did not hvae right to take into consideration mental suffering and mental grief by reason of the death of Gary Checketts, deceased. Such requested instruction was filed with the Court prior to the Court's instructing the jury and within the time provided for by the Federal Rules of Civil Procedure. (pp. 150 and 151 of Record).

II.

The Court erred in instructing the jury that in the event they found a verdict for the plaintiffs they could, in arriving at the amount of damages, consider loss of companionship, loss of society and comfort, which instruction is proper except the same was not limited to what items of damages they could not take into consideration, and in the absence of the requested instructed, implied that they could consider as an element of damages, grief and mental suffering of the parents. (pp. 147 of Record).

III.

The Court erred in refusing to grant defendant's motion for new trial upon the ground that the verdict was in an amount not authorized or allowed by the measure of damages provided for by statute in such cases. (R. pp. 20 & 21).

IV.

The Court erred in refusing to grant the defendant's motion for new trial upon the ground that the verdict returned by the jury was excessive and that bias and prejudice entered into the consideration thereof as a matter of law. (R. pp. 22-24).

V.

The Court erred in not granting the defendant a new trial for the reason that the verdict was excessive and the facts and circumstances of the case such as to incite prejudice by the jury, as a result of which the judgment was unreasonably augmented. (R. pp. 22-24).

VI.

The Court erred in refusing to grant the defendant's motion for new trial upon the ground that the jury was not instructed that, in arriving at the damages in this case, they did not have the right to take into consideration mental suffering and mental grief by reason of the death of Gary Checketts, dceeased. (R. pp. 22-24).

VII.

The Court erred in not granting defendant's motion, bringing in as a party to this suit, Ralph L. Bowman, a party without whose presence there could not be a complete determination of the controversy. (R. p. 13).

VIII.

The Trial Court erred in not reducing the verdict returned by the jury upon which judgment was entered to an amount authorized by law in such cases.

POINTS AND AUTHORITIES

I.

The law in Idaho does not allow damages for grief and anguish, and the Trial Court should have instructed the jury not to take these elements into consideration in arriving at their verdict.

American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753.

Humphreys v. Ash, 6 Atl. (2d) 436.

Gillette Motor Transport, Inc. et al v. Blair et al, 136 S.W. (2d) 656.

Burlington-Rock Island R. Co. v. Ellison et al, 134 S.W. (2d) 306.

Hemsell et al v. Summers et al, 138 S.W. (2d) 865.

Gulf, C. & S.F. Ry. Co. v. Farmer, 102 Tex. 235, Par. 3, 115 S.W. 260.

Hines v. Kelley, Tex. Com. App., 252 S.W. 1033, Pars. 1 to 3.

Houston & T.C.R. Co. v. Gant, Tex. Civ. App., 175 S.W. 745.

Gulf States Utilities Co. v. Dillon, Tex. Civ. App., 112 S.W. (2d) 752, 753, Pars. 1 to 3, and authorities there cited.

Dallas Railway & Terminal Co. v. Boland, Tex. Civ. App., 53 S.W. (2d) 158, 160, Pars. 3 & 4, and authorities there cited.

II.

The statutes of the State of Idaho and the adjudicated cases do not allow recovery for grief and anguish of a parent for the wrongful death of a child.

Sec. 5-311 Idaho Code.

Sec. 5-310 Idaho Code.

Hepp v. Ader, 64 Ida. 240, 130 Pac. (2d) 859.

Wyland v. Twin Falls Canal Co., 48 Ida. 789, 285 Pac. 676.

III.

The verdict returned by the jury in the above case is excessive and excessive in an amount not allowed by law.

Hunten v. California-Portland Cement Co., 149 Pac. (2d) 471.

Zeller v. Reid, Calif., 101 Pac. (2d) 730.

Van Cleave v. Lynch, 166 Pac. (2d) 244.

Tyson v. Romey, 199 Pac. (2d) 721.

Amer. R. Co. of Porto Rico v. Santiago et al, 9 Fed (2d) 753.

The S. S. Black Gull - Faye v. Amer. Diamond Lines, Inc. et al, 90 Fed. (2d) 619.

IV.

The Trial Court in the District Court of the United

States, in and for the District of Idaho, Eastern Division, had power and authority to grant a new trial in this case.

Rule 59A of the Federal Rules of Civil Procedure for the District Courts of the United States.

Luther v. First Bank of Troy, 64 Ida. 416, 133 Pac. (2d) 717.

Maloney v. Winston Bros. Co., 18 Ida. 740, 111 Pac. 1080.

Roy v. Oregon Short Line R.R. Co., 55 Ida. 404, 42 Pac. (2d) 476.

The S. S. Black Gull - Faye v. Amer. Diamond Lines, Inc. et al, 90 Fed. (2d) 619.

V.

The Trial Court upon motion of the defendant should have made Ralph L. Bowman a party defendant in this suit. The motion was timely made and was proper under the circumstances.

Rule 19B of the Federal Rules of Civil Procedure for the District Courts of the United States.

Greenleaf v. Safeway Trails, Inc., 140 Fed. (2d) 889.

VI.

The trial Court had power and authority to reduce the verdict to an amount authorized by law.

Geist v. Moore, 58 Idaho 149; 70 Pac. (2d) 403.

Rice v. Union Pacific R. Co., 82 F. Supp. 1002.

VII.

This Court has power to either grant a new trial in this case or to reduce the verdict to an amount comensurate with the measure of damages provided for by law.

The S. S. Black Gull - Faye v. American Diamond Lines, Inc. et al., 90 Fed. (2d) 619.

Middleton v. Luckenbach S.S. Co., 70 Fed. (2d) 326.

United States et al. v. Boykin, 49 Fed. (2d) 762.

American R. Co. of Porto Rico v. Santiago et al., 9 Fed. (2d) 753.

Cain v. Southern Ry. Co., 199 Fed. 211.

ARGUMENT

I.

Did the trial court err in refusing to grant defendant's requested instruction that the jury did not have a right to consider as an element of damages, mental suffering and mental anguish of parents?

This case was tried before a jury in this District, and this appeal presents to this Court some very interesting and difficult questions. Before the jury was instructed the defendant in this case requested that the Court instruct the jury that in the event they found for the plaintiffs, in arriving at their damages they did not have a right to take into consideration the mental grief and anguish of the plaintiffs, parents of the little boy who was killed. The defendant requested

that the Court so instruct the jury, and the requested instruction is set out on page 150 of the Transcript and reads as follows:

> "You are instructed Ladies and Gentlemen of the Jury, that if you find the plaintiffs are entitled to recover you should not take into consideration the mental suffering and mental grief of the parents by reason of the death of Gary Checketts."

The requested instruction upon this subject was not given by the Court. We felt at the time of the trial and we feel now that the defendant in this action was entitled to the requested instruction. It is perfectly obvious from the statement of the case that it is a case in which a jury would be prone to allow as damages money to the parents for the grief and anguish they suffered by reason of their little boy's death. The rule in Idaho and in all other jurisdictions, where we have been able to find the rule clearly stated, is that in an action for wrongful death, grief and anguish of the parents is not a proper element of damages, and we have cited authorities for this statement in our Points and Authorities, Numbers I and II, and the rule anounced in Idaho is the rule generally. In this connection we take the position that not only are grief and anguish excluded as an element of damages in such a case, but in addition thereto the defendant was entitled to an instruction to this effect. We have heretofore cited several cases, Points and Authorities, No. I, which insofar as this point is concerned, appear to us to be controlling, and we desire at this time to quote from the case of American R. Co. of Porto Rico v. Santiago et al, 9 Fed. (2d) 753, wherein the Circuit Court of Appeals of the Second Circuit used the following language:

> "At a subsequent trial on the question of damages the jury should be instructed, among other things, that, in considering the pecuniary loss which the father has sustained, they may take into consideration the probable duration of life of the father and of the son, the prospective pecuniary benefits which the father might reasonably be expected to receive from the son during the full period of the expectancy of life common to both, including therein not only money contributions, but also such benefits as the father might derive from the personal attention, care, protection, and assistance that the son might bestow upon the father; that in awarding damages the jury should not take into consideration or award anything for the pain and suffering of the son, nor for the sorrow or grief of the father because of the son's death."

We desire likewise at this time to call this Court's attention to the fact that the Trial Court did instruct the jury upon the proper measure of damages in such cases but did not in said instruction, or in any other instruction, state what elements of damages could not properly be considered by them, (R. pp. 137 to 148). We further take the position that by instructing on the general measure of damages in such cases the Court, inferentially at least, conveyed to the jury the impression that other elements of damage, namely, grief and anguish, might be considered by them, those elements not being excluded. (R. pp. 146 and 147).

The true measure of damages in cases like the instant one under our statute, which statute is identical with the California and New York statutes, see Hepp v. Ader, 130 Pac. (2d) 859, is that such damages may be given as under the circumstances may be just. Construction of the statute,

however, has excluded therefrom damages for grief and anguish. See Hepp v. Ader 130 Pac. (2d) 859. The wrongful death statute was originally construed to mean that only pecuniary loss or damage could be compensated for, and that such pecuniary loss should be extended to and include all pecuniary loss of every kind, which the circumstances of the particular case establish with reasonable certainty. Any other or further allowance is beyond the purview of the statute and unjust to the defendant. See Hepp v. Ader 130 Pac. (2d) 859; Wyland v. Twin Falls Canal Co., 258 Pac. 676, and Points and Authorities No. 2.

II.

Did the court err in refusing to grant defendant's motion for new trial on the ground that damages were excessive?

Defendant in this case likewise contended earnestly that the verdict in this case was excessive and was excessive to such an extent and to such a degree that the very amount of the verdict indicated prejudice of the jury or bias as a matter of law, or the fact that the jury had considered matters as damages not proper for their consideration. A careful examination of the authorities, not only from Idaho but from other jurisdictions, indicates conclusively that Appellate Courts have not hesitated to grant new trials in such cases or to arbitrarily reduce the verdict to an amount commensurate with the measure of damages provided for by law. We have cited Hunton v. California-Portland Cement Co., 149 Pac. (2d) 471, a California case, in which a verdict of $40,000.00 was allowed by the jury for the death of a minor child. In

that case the California Court held, and we quote from that opinion:

> "In the instant case there can be no question that the allowance of $40,000.00 made by the jury was excessive, both as not supported by the evidence and as indicating passion or prejudice."

For the same holding we desire to particularly call the Court's attention to the case of Zeller v. Reed, Calif., 101 Pac. (2d) 730, wherein the same rule is announced and the same conclusion reached. (Points and Authorities No. III.)

At this time we desire to call this Court's attention to the fact that the California wrongful death statute is identical to the Idaho statute. Hence, the California authorities heretofore cited are strongly persuasive.
fore cited are strongly presuasive. See Hepp v. Ader, 130 Pac. (2d) 859.

We have examined the authorities from various jurisdictions, and we have found no cases in which a verdict or judgment of $35,000.00 has been upheld for the wrongful death of a small child approximately eight years of age, but that the authorities have, as nearly as we are able to ascertain, uniformly held that an award of such an amount indicates constructive bias or prejudice, or that the jury took into consideration matters and things that were not proper to consider in arriving at the verdict. As the Court knows there is no standard or basis for arriving at the damages that a parent suffers by reason of the death of a small child, and it is difficult or impossible to argue that a small child is not worth $35,000.00

to his parents. Hence, the only basis upon which we can arrive at what is the fair pecuniary reward for the wrongful death of a child is an examination of the statutes providing a measure for damages in such event and the cases from various jurisdictions construing the statute.

The authorities universally hold that where the amount of the verdict and judgment is not commensurate with the measure of damages provided for by statute, that then and in that event the verdict is excessive. The cases likewise hold that there must be some reasonable relation between the amount of the verdict and the measure of damages provided by law and must be tied directly to the pecuniary loss sustained by the parents. We submit, therefore, that under the authorities and under any reasonable view of the situation, there is no basis in law by which a verdict of $35,000.00 may be allowed for the death of a minor child eight years of age. (Points and Authorities No. III.)

We further take the position in this case that the Trial Court could have granted to us a new trial upon the ground that the verdict returned by the jury in the instant case was excessive, or that the Trial Court could have reduced the amount of the verdict. The law in Idaho with respect to this important matter is announced in the case of Luther v. First Bank of Troy, supra., wherein the following rule is announced:

> "While the amount of damages is peculiarly for the jury to determine under the facts of each particular case, this court can nevertheless determine whether or not the damages are so large as to indicate the in-

> fluence of passion and prejudice in the verdict. If the verdict is excessive but does not indicate such influence of passion and prejudice as to taint the entire verdict, that is, indicate that the rendering of any verdict against the defendant was because of passion and prejudice, merely that the verdict is excessive in amount, this court has reduced the amount, making its acceptance optional. (Maloney v. Winston Bros. Co., 18 Ida. 740, 111 Pac. 1080; Kinzell v. Chicago etc. Ry. Co., 33 Ida. 1, 190 Pac. 255; Roy v. Oregon Short Line R. R. Co., 55 Ida. 404, 42 Pac. (2d) 476). If, however, passion and prejudice evidently entered into the jury's deliberations not only as to the amount of the verdict but as to contributing to its returning any verdict at all, the verdict is vitiated and the only constitutional protection is to grant a new trial."

It does seem to us that the verdict in the instant case was so disproportionately high, considering the measure of damages provided for by law, that there is apparent in the verdict passion or prejudice, or both, and that there is truly reflected in the verdict an attempt on the part of the jury to invoke penal damages against the defendant, or damages in the way of penalty, the amount of the verdict being inconsistent with the measure of damages provided for by law. We submit that under the authorities it is not incumbent upon a defendant in such case to produce evidence or show that the jury was actually biased, but that the amount of the verdict itself conclusively indicates the existence of bias and prejudice, or both; Points and Authorities No. 3; and that it is proper for the Trial Court, or in this case this Court, to relieve the defendant from a judgment which is improper. For our present purposes we assume that the authorities are sufficiently clear, confer-

ring the right upon this Court to grant a new trial for excessiveness of damages, that we need argue it no further. Points and Authorities Nos. 6 and 7.

We feel that the verdict in this case is so excessive that we are entitled to a new trial, at which new trial we would be entitled to an instruction excluding from the jury's consideration the elements of anguish and grief suffered by the parents. If, however, this Court does not feel that under all of the circumstances we are entitled to a new trial, we submit that we are entitled to have the verdict of the jury reduced to an amount which is commensurate with the measure of damages provided for by law. Points and Authorities No. 6 and 7. It cannot be questioned that the trial court had power to effect such a reduction, or grant a new trial, and it is likewise fully within the power of this Court to adjust the damages to a figure that will reasonably correlate with those damages allowed by law under similar circumstances. Points and Authorities No. 6 and 7.

It cannot be questioned that the trial court had power to effect such a reduction, or grant a new trial, and it is likewise fully in the power of this Court to adjust the damages to a figure that will reasonably correlate with those damages allowed by law under similar circumstances.

III.

Did the Court err in refusing to grant defendant's motion to bring in as a party defendant Ralph L. Bowman?

Before the trial of this case the defendant filed a written

motion with the Trial Court, asking the Trial Court by order to bring into the case Ralph L. Bowman, who was the operator of the defendant's truck, but who was not made a party defendant by the plaintiffs. (R. pp. 12-13). We based our motion and right to have him made a party to the action by virtue of the provisions of Rule 19B of the Federal Rules of Civil Procedure fro the District Courts of the United States, which rule provides that upon motion any person may be made a party to an action, whose being a pary is necessary for a full determination of the controversy, or as more exactly stated by the rule, persons should be made parties, who ought to be parties if complete relief is to be accorded between those already parties. In this connection we desire to call the Court's attention to the fact that Ralph L. Bowman is a resident of the 90 and 91, and 121 to 137 of Transcript). He could have been made a party defendant to this suit without depriving this Court of jurisdiction, and, being the agent of the defendant corporation and the operator of the truck, was a proper party to a full determination of the case. Motion bringing him in as a party was properly made by the defendant, which motion was denied by the Trial Court.

Respectfully submitted,

O. R. BAUM
BEN PETERSON
DARWIN D. BROWN

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